



TOWN OF WESTBOROUGH MASSACHUSETTS

OFFICE OF THE TOWN CLERK

TOWN HALL - 34 WEST MAIN STREET
WESTBOROUGH, MA 01581-1998
TEL: (508) 366-3020 | FAX: (508) 366-3012

October 26, 2023

LEGAL NOTICE FOR ATTORNEY GENERAL DECISION

This is to notify voters in the Town of Westborough, in accordance with G.L. c. 40, § 32, that on October 23, 2023, the Attorney General approved the following articles from the March 25, 2023, Annual Town Meeting:

WARRANT ARTICLES: #27 and #29 (General Bylaws)

The articles mentioned above have been posted by a Constable in the following locations in the Town of Westborough: Town Hall Posting Board and the Public Library.

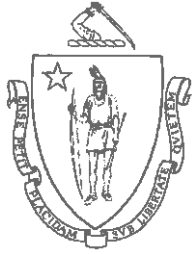
The Attorney General's Decisions on Articles 27 and 29 were also posted to the Town's Official Website.

Respectfully submitted,

Deborah E. Ledoux, Town Clerk

Constable: _____

Printed Name



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(508) 792-7600
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October 23, 2023

Deborah E. Ledoux, Town Clerk
Town of Westborough
34 West Main Street
Westborough, MA 01581

Re: Westborough Annual Town Meeting of March 25, 2023 – Case # 10890
Warrant Articles # 32, 33, and 34 (Zoning)
Warrant Articles # 27, 29, 31, 35, and 38 (General) ¹

Dear Ms. Ledoux:

Article 27 – Under Article 27 the Town voted to amend its general by-laws to add a new Article 57, “Stormwater Utility Bylaw.” We approve Article 27 because it is consistent with state law and the constitution. Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law).

In our decision below, we summarize the by-law adopted under Article 27, the Attorney General’s standard of review, and then explain why, based on this standard of review, we approve Article 27.

I. Summary of Article 27

The by-law is adopted for purposes of administering the Town’s stormwater management program (“stormwater program”). Section 1 “General Provisions.” The purposes of the stormwater program include protecting the health and safety of the public, protecting property from flooding and runoff damage, managing water quality by controlling pollutants in stormwater runoff, and to meet state and federal regulatory requirements under the National Pollution Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System (MS4) General Permit. Section 1. The stormwater program will be administered by the Select Board. Section 1. Section 4 authorizes the Town to establish a charge for use of the Town’s stormwater management services, known as a

¹ In a decision issued July 18, 2023 we approved Articles 31, 32, 33, 34, 35, and 38 and by agreement with Town Counsel under G.L. c. 40, § 32 we extended our deadline for Articles 27 and 29 for sixty days until September 22, 2023. On September 22, 2023, we further extended our deadline for Article 27 and 29 for an additional thirty days until October 22, 2023. We will issue our decision on Article 29 separately.

“Stormwater Utility fee.” Stormwater charges will be proportionally calculated and assessed, in accordance with G.L. c. 83, § 16, and will be used to construct, operate, maintain and regulate stormwater management systems and facilities in the Town. Section 4 (A).

II. Attorney General’s Standard of Review

Our review of Article 27 is governed by G.L. c. 40, § 32. Under G.L. c. 40, § 32, the Attorney General has a “limited power of disapproval,” and “[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws.” Amherst, 398 Mass. at 795-96. The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 (“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”) To disapprove a by-law (or any portion thereof), the Attorney General must cite to an inconsistency between the by-law and the state Constitution or laws. Id. at 796. “This is because a municipality has no power to adopt a by-law that is “inconsistent with the constitution or laws enacted by the [Legislature].” Home Rule Amendment, Mass. Const. amend. art. 2, § 6.

III. Comments on Provisions of the Stormwater Utility By-law

A. Section 4 – Stormwater Utility Fee

Section 4 (C) authorizes the Town to establish a dedicated Stormwater Enterprise Fund for the purpose of managing funds collected under the stormwater program. All revenues and receipts from the stormwater utility will be placed in the Stormwater Enterprise Fund as provided for in G.L. c. 44, § 53 F ½.

The Department of Revenue/Division of Local Services (DOR/DLS) has issued a guidance document advising towns that they must first vote to accept the provisions of G.L. c. 44, § 53F ½ before depositing fees into a Stormwater Enterprise Fund. In addition, DOR/DLS recommends that the fund’s use begin at the start of the fiscal year. See IGR 2022-16, “Enterprise Funds,” p. 3 (December 2022).²

In addition, the Town must ensure that its use of the Enterprise Fund is consistent with G.L. c. 44, § 53 F ½, that provides in relevant part as follows:

No later than one hundred and twenty days prior to the beginning of each fiscal year, an estimate of the income for the ensuing fiscal year and a proposed line item budget of the enterprise shall be submitted to the mayor, board of selectmen or other executive authority of the city or town by the appropriate local entity responsible for operations of the enterprise. Said board, mayor or other executive authority shall submit its recommendation to the town meeting, town council or city council, as the case may be, which shall act upon the budget in the same manner as all other budgets.

² A copy of IGR 2022-16 can be found here:

<https://dls.gateway.dor.state.ma.us/gateway/DLSPublic/IgrMaintenance/Index/789>

Section 53F ½ requires Town Meeting approval of the Enterprise Fund's budget. Any expenditures from the Enterprise Fund must be applied consistent with the Enterprise Fund's budget as approved by Town Meeting. The Town should consult with Town Counsel and DOR/DLS to ensure the proper use of the Stormwater Enterprise Fund.

B. Section 8 – Stormwater Utility Fee Exemptions

Section 8 states that, because all developed property in the Town contributes to runoff and either uses or benefits from the maintenance of the stormwater system, all developed property in the Town will be subject to the by-law, except for those properties exempt under Section 8 (B) or exempted under law. Section 8 (B) exempts from the Stormwater Utility fee the following: (1) undeveloped land; (2) railroad right-of-way (tracks); and (3) public streets, highways, rights-of-way and Town owned properties, but provides that “[a]ll other State, Federal and Country properties are subject to the user fee charges on the same basis as private properties.”

We approve Section 8 (B) (3), but the Town's authority to regulate state and federal entities is limited. “The doctrine of essential governmental functions prohibits municipalities from regulating entities or agencies created by the Legislature in a manner that interferes with their legislatively mandated purpose, absent statutory provisions to the contrary.” Greater Lawrence Sanitary Dist. v. Town of North Andover, 439 Mass. 16 (2003). See also Teasdale v. Newell & Snowling Const. Co., 192 Mass. 440 (1906) (holding local board of health could not require state park commissioners to obtain license to maintain stable on park land). Similarly, municipalities may not regulate federal governmental entities in a manner that impedes with their purpose. Cf. First Nat'l Bank v. Missouri, 263 U.S. 640, 656 (1926) (state laws may not regulate federal entities if “such laws interfere with the purposes of their creation [or] tend to impair or destroy their efficiency as federal agencies”); Palfrey v. City of Boston, 101 Mass. 329 (1869) (federal internal revenue stamps not subject to state or local property tax). The Town's enforcement of the by-law's user fee provisions cannot impermissibly interfere with the operation of state or federal entities. The Town should discuss any questions regarding the proper application of the by-law with Town Counsel

C. Section 9 – Stormwater Utility Fee Credits

Section 9 authorizes the Director of Public Works (or their designee) to grant a credit to a property owner “based on the technical and procedural criteria set forth in the Stormwater Utility Credit Manual (Credit Manual) to be developed, maintained and, from time to time, amended by the [Select] Board.” Any rules or regulations adopted by the Select Board or the Director of Public Works, including the Credit Manual, must be consistent with state law. See American Lithuanian Naturalization Club v. Board of Health of Athol, 446 Mass. 310, 321 (2006) (“A town may not promulgate a regulation that is inconsistent with State law.”) The Town should discuss with Town Counsel any proposed rules and regulations, including the Credit Manual, adopted under Section 9 to ensure that they comply with state law.

D. Section 10 – Stormwater Utility Fee Billing, Delinquencies, Collections and Abatements

Section 10 (D) authorizes the use of G.L. c. 83, § 16A through 16F, including placing a lien upon real estate, for collection of stormwater utility fees. According to DOR/DLS, if it has not already done so, the Town, at a Town Meeting, must first vote to accept the provisions of G.L. c. 83, §§ 16A through 16F before the Town can use those provisions. The Town should consult with Town Counsel and DOR/DLS with any questions on this matter.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

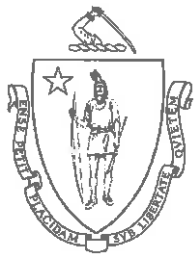
Very truly yours,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

Kelli E. Gunagan

By: Kelli E. Gunagan
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cc: Town Counsels Shirin Everett and Gregg J. Corbo



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Re: **Westborough Annual Town Meeting of March 25, 2023 -- Case # 10890**
Warrant Articles # 32, 33, and 34 (Zoning)
Warrant Articles # 27, 29, 31, 35, and 38 (General)¹

Dear Ms. Ledoux:

Article 29 – Under Article 29 the Town voted to amend its general by-laws to delete the existing text and insert new text for Article 51, “Water Use Restriction.” As explained in more detail below, we approve the new text because it does not conflict with the Constitution or laws of the Commonwealth. See Amherst v. Attorney General, 398 Mass. 793, 795-96 (1986) (requiring inconsistency with state law or the constitution for the Attorney General to disapprove a by-law). However, we offer the following comments for the Town’s consideration when applying the new by-law.

We emphasize that our decision in no way implies any agreement or disagreement with the policy views that may have led to the passage of the by-law amendments. The Attorney General’s limited standard of review requires her to approve or disapprove by-laws based solely on their consistency with state law, not on any policy views she may have on the subject matter or wisdom of the by-law. Id. at 795-96, 798-99. During our review of Article 29, we received correspondence urging us to disapprove the by-law asserting that the Town does not have the authority to 1) impose water use restrictions on private well users or 2) declare that drought conditions exist in the Town. See June 12, 2023 and September 8, 2023 letters from Attorney Heuer to Attorney General Campbell. We also received input from Town Counsel urging us to approve the by-law because

¹ In a decision dated July 18, 2023, we approved Articles 31, 32, 33, 34, 35, and 38 and by agreement with Town Counsel pursuant to G.L. c. 40, § 32 we extended our deadline for Articles 27 and 29 for sixty days until September 22, 2023. On September 22, 2023, we further extended our deadline for Articles 27 and 29 for an additional thirty days. On October 23, 2023, under separate cover, we issued our decision approving Article 27.

the Town has authority under state law and the Home Rule Amendment to the Massachusetts Constitution to restrict water usage during drought conditions, including private well users' usage. See July 25, 2023 letter from Town Counsel Corbo to AAG Hurley. We appreciate these communications as they have aided our review. As explained below, the arguments advanced in the opposition do not provide us with grounds to disapprove Article 29.

In this decision we describe the by-law amendments; discuss the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and then explain why, governed as we are by that standard, we approve Article 29.

I. Summary of Article 29

Under Article 29 the Town voted to delete Article 51 from the Town's general by-laws and insert a new Article 51, "Water Use Restriction" that authorizes the Town's Director of Public Works (Director) to adopt regulations that limit or prohibit nonessential outdoor water use in the Town during droughts and other water emergencies. Section 5 "Regulation of Nonessential Outdoor Water Use."² The purpose of the new by-law is to ensure that there is an adequate water supply for drinking, cooking, fire protection, agriculture, and to protect aquatic habitats in the Town. See Section 2, "Purpose." The Town adopted the by-law pursuant to its Home Rule Authority and its statutory powers, including G.L. c. 40, §§ 21 and 41A, and c. 41, § 69B. Section 1, "Authority." The by-law states it is adopted to implement water conservation requirements under G.L. c. 21G, the "Massachusetts Water Management Act" (WMA). Section 2 states that the by-law allows the Town to impose and enforce water use restrictions imposed either by the Town or by the Department of Environmental Protection (DEP) under a WMA permit or registration when the Town is in a state of drought.

To accomplish these purposes, Section 5 authorizes the Director to adopt regulations limiting or prohibiting "nonessential outdoor water use" when a drought is declared by the Director or the state's Office of Energy and Environmental Affairs. The by-law defines "nonessential outdoor water use" as the "use of water that is not required for one of the following purposes":

- (a) for health or safety reasons, including public facilities used for cooling such as splash pads and swimming pools, and for washing of boats, engines, or marine equipment to prevent negative saltwater impacts or the transfer of invasive aquatic species;
- (b) by permit, license, statute or regulation;
- (c) for the production of food, including vegetable gardens, and fiber;

² The Town's existing Article 51 included a list of water use restrictions that could have been imposed during a State of Water Supply Conservation in the Town including limiting outdoor watering to odd and even days; a complete outdoor water ban; limiting watering to hours of low demand; prohibiting filling swimming pools; and prohibiting the use of automatic sprinklers. Sections 5 (A) through (E).

(d) for the maintenance of livestock;

(e) to meet the core functions (those functions essential to the commercial operations) of a business, including but not limited to:

1. plant nurseries as necessary to maintain stock;
2. golf courses as necessary to maintain greens and tees, and limited fairway watering per 310 CMR 36.07(2)(c)2.a. through c.
3. venues used for weddings or similar special events that limit watering to hand-held hose or drip irrigation as necessary to maintain gardens, flowers and ornamental plants;
4. professional washing of exterior building surfaces, parking lots, driveways and/or sidewalks as necessary to apply surface treatments such as paint, preservatives, stucco, pavement, or cement in the course of construction, reconstruction or renovation work;

(f) for irrigation of public parks before 9:00 A.M. and after 5:00 P.M.,

(g) for irrigation of public and private recreation fields, including those operated by schools, colleges, universities and athletic associations, before 9:00 A.M. and after 5:00 P.M.,

(h) for irrigation of publicly-funded shade trees and trees in the public right-of-way; or

(i) to establish a new lawn as necessary to stabilize soil in response to new construction or following the repair or replacement of a Title 5 system.

The regulations may include a tier system that imposes restrictions based on the severity of the drought conditions and the regulations must include a procedure for notifying the Town of the effective date of the water use restrictions and the termination date of the restrictions. Section 5. The regulations adopted by the Director must be at least as restrictive as those imposed by DEP, including those restrictions listed in 310 CMR 36.00, but may be more restrictive if there is a local need. Section 5. The by-law states that the regulations adopted by the Director apply both to public water supply users and private well users, including wells used solely for irrigation purposes "[b]ecause all residents and business in the Town of Westborough draw from the same underground aquifer regardless of whether they use the public water supply or private on-site wells. . . ." Section 3, "Applicability" and Section 5. The by-law prohibits anyone from using water for nonessential outdoor use unless they comply with regulations imposed by the Director during times of drought conditions and imposes a civil fine for violations of by-law or the regulations. Sections 5 and 6.

II. Attorney General's Standard of Review

Our review of Article 29 is governed by G.L. c. 40, § 32. Pursuant to G.L. c. 40, § 32 the Attorney General has a “limited power of disapproval,” and “[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws.” Amherst, 398 Mass. at 795-96 (1986). The Attorney General does not review the policy arguments for or against the enactment. Id. at 798-99 (“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”) Rather, to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the Constitution or laws of the Commonwealth. Id. at 796. “As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid.” Bloom v. Worcester, 363 Mass. 136, 154 (1973).

III. There is no Clear Inconsistency Between the By-law and State Law that Requires Disapproval of Article 29

During our review of Article 29, we received communications urging this Office to disapprove Article 29 contending that the Town does not have statutory or Home Rule authority to regulate private well users and the regulation of nonessential water usage on private well users results in an unconstitutional taking of property in violation of the federal and state constitutions. See June 12, 2023 and September 8, 2023 letters from Attorney Heuer to Attorney General Campbell. The opponent alleges that the Town cannot impose water use restrictions on private well users because the Legislature has given this authority exclusively to the DEP. See June 12, 2023 letter from Attorney Heuer to Attorney General Campbell, pp. 4-6, and September 8, 2023 letter, pp. 2-3. These assertions do not provide us with grounds to disapprove the by-law.

A. Article 29 is Consistent with the Town’s Municipal Power to Regulate Water Use

The by-law is within the Town’s Home Rule and statutory power. The state constitution’s Home Rule Amendment, as ratified by the voters in 1966, confers broad powers on individual cities and towns to legislate in areas that previously were under the Legislature’s exclusive control. Home Rule Amendment, Mass. Const. amend. art. 2, § 6. The Attorney General has no power to disapprove a by-law merely because a town, in comparison to the rest of the state has chosen a novel, unusual, or experimental approach to a perceived problem. Indeed, the Supreme Judicial Court has upheld such by-laws and has overturned the Attorney General’s disapproval of them where they did not create any specific conflict with state law. Amherst, 398 Mass. at 799; see also Milton v. Attorney General, 372 Mass. 694, 695-96 (1977).

The broad grant of municipal authority in the Home Rule Amendment is supplemented by the statutory authority in G.L. c. 40, § 21 to adopt certain categories of local legislation, including “[f]or directing and managing their prudential affairs, preserving peace and good order...” Together the Home Rule Amendment and G.L. c. 40, § 21 provide broad authority for towns to

adopt local by-laws regulating groundwater use, including nonessential outdoor water use. See, e.g., Town of Uxbridge v. Travers, 19 Mass.App.Ct. 951 (1985) (upholding town by-law requiring connection to town public sewer system because by-law was a “valid exercise of the legislative powers which the town may employ” under Home Rule Amendment and Home Rule Procedures Act, G.L. c. 43B, § 13). In addition, several other statutes specifically authorize towns to regulate groundwater, including private wells. See, e.g., G.L. c. 111, §§ 122 and 122A (authorizing boards of health to discontinue use of the water supply and provide a safe and adequate supply of drinking water if the water is unsafe or inadequate as to constitute a nuisance); and c. 111, § 31 (authorizing boards of health to adopt reasonable health regulations, including private well regulations.)

B. Article 29 is Not Preempted by DEP’s Authority to Regulate Water Use

The opponent alleges that Article 29 conflicts with DEP’s authority to regulate and manage water use, including DEP’s authority under G.L. c. 21G, the WMA. Based in part on input received from DEP during our review of the by-law, we determine that the by-law is not preempted by the WMA.

In determining whether a by-law is inconsistent with a state statute, the “question is not whether the Legislature intended to grant authority to municipalities to act...but rather whether the Legislature intended to deny [a municipality] the right to legislate on the subject [in question].” Town of Wendell, 394 Mass. at 524 (1985). “This intent can be either express or inferred.” St. George Greek Orthodox Cathedral of Western Mass. v. Springfield, 462 Mass. 120, 125-26 (2012). Local action is precluded in three instances: (1) where the “Legislature has made an explicit indication of its intention in this respect”; (2) where “the State legislative purpose can[not] be achieved in the face of a local by-law on the same subject”; and (3) where “legislation on a subject is so comprehensive that an inference would be justified that the Legislature intended to preempt the field.” Town of Wendell, 394 Mass. at 524. “The existence of legislation on a subject, however, is not necessarily a bar to the enactment of local ordinances and by-laws exercising powers or functions with respect to the same subject[, if] the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject[.]” Bloom, 363 Mass. at 156; see Town of Wendell, 394 Mass. at 527-28 (“It is not the comprehensiveness of legislation alone that makes local regulation inconsistent with a statute. . . . The question . . . is whether the local enactment will clearly frustrate a statutory purpose.”).

The Legislature adopted G. L. c. 21G in 1985 to establish a statewide regulatory program for water withdrawals, including prohibiting withdrawal of more than 100,000 gallons per day from any water source without a registration or permit. Town of Concord v. Water Department of Littleton, 487 Mass. 56, 56 (2021) (the Act establishes a regulatory system where the state regulates water withdrawals over a certain amount by private and public water suppliers through registrations and permits); see G.L. c. 21G, §§ 2, 4, 5, and 7. The Act was enacted to:

protect the natural environment of the water in the commonwealth; to assure comprehensive and systematic planning and management of water withdrawals and use in the commonwealth, recognizing that water is both finite and renewable; and to allow continued and sustainable economic growth throughout the commonwealth and increase the social and economic well-being and safety of the

commonwealth's citizens and of its work force.

G.L. c. 21G, § 3.

Section 3 grants authority to the DEP to “adopt such regulations as it deems necessary to carry out the purposes of this chapter, establishing a mechanism for managing ground and surface water in the commonwealth as a single hydrological system and ensuring, where necessary, a balance among competing water withdrawals and uses.” Pursuant to that authority, the DEP requires a permit for water withdrawals more than 100,000 gallons per day. 310 CMR § 36.16. According to input received from DEP during our review of the by-law,³ DEP has the exclusive authority to regulate water withdrawals above the threshold withdrawal volume of 100,000 gallons per day. Therefore, if a town by-law were to prohibit withdrawals of more than 100,000 gallons per day, that by-law would interfere with DEP’s exclusive authority to issue permits for and regulate water withdrawals of more than 100,000 gallons per day. See St. George Greek Orthodox Cathedral of Western Massachusetts, Inc., 462 Mass. at 126 (local legislative action “is precluded . . . where . . . the purpose of State legislation would be frustrated [by a local enactment] so as to warrant an inference that the Legislature intended to preempt the field.”). However, DEP does not view the by-law here as interfering with this exclusive authority because it targets water use under the regulatory threshold of 100,000 gpd. Id.; see also G.L. c. 21G, § 4. DEP does not interpret the Act as preempting municipal regulation of private wells. The Act therefore does not prevent a Town’s local regulation, as Westborough has done here. See Lovequist v. Conservation Commission of Town of Dennis, 379 Mass. 7 (1979) (Wetlands Protection Act establishes only minimum standards and therefore local communities are free to adopt more stringent controls).

In light of the Town’s municipal power and DEP’s that the by-law is not preempted, we determine that the by-law is not preempted by DEP’s authority under the Act to regulate water withdrawals.

C. Article 29 Does Not Conflict with the State’s Authority to Declare Droughts

The opponent claims that the Director’s authority to declare periods of droughts in the Town conflicts with DEP’s authority to declare droughts. See June 12, 2023 letter from Attorney Heuer to Attorney General Campbell, pp.7-8. According to the input we received from DEP, a declaration of drought is declared by the Secretary of the Executive Office of Energy and Environmental Affairs not the DEP. The DEP has the authority to issue a Declaration of State of Water Emergency pursuant to G.L. c. 21G, § 15, and 310 CMR 36.40. According to the DEP, such a Declaration of Water Emergency is issued, when appropriate, in response to a request by a public water supplier, which may be necessitated by drought conditions (whether declared by the Secretary or not), or other circumstances (e.g., contamination, water main break). See 310 CMR 36.40 (2). DEP’s Declaration of a State of Water Emergency for a specific public water supplier is never accompanied by or preceded by a drought declaration by DEP and does not require a drought declaration by the Secretary. See 310 CMR 36.40.⁴

³ See Email from Attorney MacKay to Attorney Gunagan dated August 24, 2023.

⁴ DEP’s requirement for registered public water suppliers to impose restrictions on nonessential outdoor water use is triggered by a drought declaration made by the Secretary. See 310 CMR 36.07

Moreover, Sections 15 through 17 of the Act, regarding the Declaration of a State of Water Emergency, do not limit municipal authority over private wells. According to DEP, while it can impose restrictions on withdrawals from private wells in the context of a Declared State of Water Emergency, DEP has never interpreted these provisions of the Act as creating an *exclusive* state authority over private wells. See G.L. c. 21G, § 17.

D. Article 29 Does Not Violate the Home Rule Limitation on Regulating Private Relationships

We have also considered the opponent's contention that Article 29 conflicts with the limitations established by the state constitution's Home Rule Amendment, Mass. Const. amend. art. 2 (as amended by amend. art. 89). Section 7 (5) of the Home Rule Amendment, Mass. Const. amend. art. 2, prohibits municipalities from enacting "private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power." The Supreme Judicial Court first interpreted the meaning of this clause in Marshal House, Inc. v. Rent Review and Grievance Board of Brookline, 357 Mass. 709 (1970), in which the Court held that a by-law enacting a form of "rent control" was an impermissible private or civil law governing a civil relationship. The Court admitted that "[a]mbiguity exists . . . concerning the meaning of . . . § 7(5)." Id. at 713. Nonetheless, the Court concluded that "[t]he term 'private or civil law governing civil relationships' is broad enough to include law controlling ordinary and usual relationships between landlords and tenants." Id. at 716. The Court noted that the by-law "affords . . . the power in effect to remake, in important respects, the parties' contract creating a tenancy." Id. By "restricting[ing] the rent which may be charged to the tenant" the proposed by-law "directly intervenes in the continuing landlord-tenant relationship." Id. at 715. Since the municipal board, operating pursuant to the challenged by-law, could "remake, in important respects, the parties' contract" and thereby alter a "continuing . . . relationship," the by-law was a private or civil law governing a civil relationship.

Three years later, in Bloom v. City of Worcester, 363 Mass. 136 (1973), the Court held that the creation of a municipal human rights commission was not an enactment of private or civil law governing a civil relationship. The Court distinguished its case from Marshal House as follows: "No new rights or obligations between persons are created by the ordinance; no existing rights or obligations between persons are modified or abolished." Id. at 146. "At most . . . the ordinance and activities undertaken pursuant to it can encourage a person by moral suasion to do what the [state] law governing his civil relationships already requires him to do." Id. at 147.

Together, Marshal House and Bloom suggest certain distinguishing features of private or civil laws governing civil relationships. An enactment that "remake[s], in important respects," an agreement governing a "continuing . . . relationship," and which impacts its enforcement through means "predominantly civil in character," is likely a private or civil law governing a civil relationship. See Marshal House, 357 Mass. at 716-17. Put differently, "[d]oes the by-law so directly affect the relationship, otherwise than 'as an incident to an exercise of independent municipal power,' as to come within § 7 (5)?" Id. at 717. In contrast, an enactment in which "[n]o

new rights or obligations between persons are created [and] *no existing rights or obligations between persons are modified or abolished*,” Bloom, 363 Mass. at 146 (emphasis added), is likely not a private or civil law governing a civil relationship.⁵

Here, the by-law’s grant of authority to the Director to adopt regulations restricting nonessential outdoor water use does not appear to meet any of the criteria that identify “private or civil law governing civil relationships.” It does not remake, in any important respect, any private agreement governing a continuing relationship. The Director’s authority to adopt regulations does not appear, in any meaningful way, to create or modify any “rights or obligations” between private persons.

Even “[a]n ordinance which governs a civil relationship may be valid despite the proscription of § 7(5) if it is ‘incident to an exercise of an independent municipal power.’” Bannerman v. City of Fall River, 391 Mass. 328, 332 (1984) (quoting Mass. Const. amend. art. 2, § 7(5)). Any effect that Article 29 may have on private civil relationships is incidental to the exercise of the Town’s independent power to protect its groundwater and the public health and safety generally. See, e.g., Take Five Vending, Ltd. v. Town of Provincetown, 415 Mass. 741, 748 (1993) (Town by-law prohibiting the sale of cigarettes in vending machines due to public health concerns identified in the by-law was a valid exercise of the Town’s power to promote legitimate municipal health goals.) Thus, we cannot conclude that Article 29 conflicts with the Home Rule Amendment’s limitation on regulating private civil relationships.

D. The Determination Whether Article 29 Results in a Taking or Violates G.L. c. 79 Requires Factual Findings Beyond the Scope of By-law Review Under G.L. c. 40, § 32

The opponent contends that the by-law amounts to a taking of their property without just compensation in violation of Fifth Amendment to the United States Constitution and the Tenth Amendment to the Massachusetts Declaration of Rights, and G.L. c 79, related to eminent domain. As explained below, this argument does not furnish the Attorney General with grounds to disapprove the by-law.

The determination of whether a by-law results in a regulatory taking, or implicates landowner rights established by eminent domain principles, requires a factual inquiry that is beyond the scope of the Attorney General’s review of town by-laws pursuant to G.L. c. 40, § 32. Instead, these are factual inquiries that must be resolved based upon a full factual record if a case is properly initiated before a court. See Giovanella v. Conservation Commission of Ashland, 447 Mass. 720, 725 (2006) (in the context of a regulatory taking claim, the court’s role in identifying

⁵ This concept of private or civil law is consistent with that offered by other legal authorities. “Private law consists of the substantive law which establishes legal rights and duties between and among private entities, law that takes effect in lawsuits brought by one private entity against another.” Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. Rev. 671, 688 (1973). Examples include “contracts, property, and torts.” *Id.* at 687. “[A] municipality is considered to have enacted private law when an ordinance significantly affects private legal relationships” Note, *Municipal Home Rule Power: Impact on Private Legal Relationships*, 56 Iowa L. Rev. 631, 631 (1971).

when a regulation has gone “too far” to be a regulatory taking “is a fact-sensitive inquiry.”); see also Lichoulas v. City of Lowell, 78 Mass. App. Ct. 271, 276 (2010) (proper means to challenge the validity of a municipality’s exercise of the power of eminent domain to take private property is to bring an action in equity challenging the validity of that taking).

The Attorney General’s review of a by-law is based primarily if not exclusively on the materials that G.L. c. 40, § 32, requires a town to submit: “a certified copy of such by-law with a request for its approval, a statement clearly explaining the proposed by-law, including maps and plans if necessary, and adequate proof that all of the procedural requirements for the adoption of such by-law have been complied with.” The fact-based inquiry required for a regulatory takings and eminent domain analysis would involve consideration of evidence and determination of factual issues going well outside the bounds envisioned by G.L. c. 40, § 32.

IV. Additional Comments for the Town’s Consideration

Section 5 authorizes the Director to adopt regulations restricting or prohibiting nonessential outdoor water use during periods of droughts. Any regulations adopted by the Director under Section 5 of the by-law that impose limitations or prohibitions on nonessential outdoor water use must be consistent with state law. See American Lithuanian Naturalization Club v. Board of Health of Athol, 446 Mass. 310, 321 (2006) (“A town may not promulgate a regulation that is inconsistent with State law.”) The Town should discuss any proposed regulations with Town Counsel to ensure that they comply with state law.

V. Conclusion

Because the Town is not prohibited either under the Home Rule Amendment or state law from adopting a water use restriction by-law that authorizes the Director to adopt regulations imposing limits or prohibitions on nonessential outdoor water use by all water users in the Town, we cannot conclude that Article 29 conflicts with state law. We therefore approve it.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,
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